

IN THE SUPREME COURT OF IOWA
Supreme Court No. 19-0022

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIEL WESLEY DAVIS, JR.,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR TAMA COUNTY
THE HONORABLE MARY E. CHICHELLY, JUDGE

APPELLEE'S BRIEF

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**STATEMENT OF THE ISSUE PRESENTED FOR
REVIEW**

- I. The district court has not issued a final order of restitution. Is the assessment of costs enforceable or appealable?**

Authorities

State v. Albright, 925 N.W.2d 144 (Iowa 2019)
State v. Cassias, S.Ct. No. 18-1174, 2019 WL 4678164
(Iowa Ct. App. Sept. 25, 2019)
State v. Ceretti, 871 N.W.2d 88 (Iowa 2015)
State v. Comly, S.Ct. No. 18-1825, slip op. 3
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State v. Gavin, S.Ct. No. 18-1258, 2019 WL 2871423
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State v. Walker, 610 N.W.2d 524 (Iowa 2000)
Tindell v. State, 629 N.W.2d 357 (Iowa 2001)
Iowa Code ch. 910 (2019)
Iowa Code § 814.6
Iowa Code § 910.1(4)
Iowa Code § 910.2
Iowa Code § 910.2(1)
Iowa Code § 910.3
Iowa Code § 910.5(1)(d)
Iowa Admin. Code r. 201-20.11

ROUTING STATEMENT

The Supreme Court should retain this case. *State v. Albright* held that “any temporary, permanent, or supplemental order regarding restitution is not appealable or enforceable until the court files its final order of restitution.” 925 N.W.2d 144, 162 (Iowa 2019). But the Court of Appeals has noted that it and the Supreme Court has vacated “restitution-related orders absent a final restitution order.” *State v. Comly*, S.Ct. No. 18-1825, p. 3 (Iowa Ct. App. Oct. 9, 2019); see *State v. Moore*, S.Ct. No. 18-1877, 2019 WL 4297255, at *5, n.3 (Iowa Ct. App. Sept. 11, 2019) (collecting cases). It then has ordered the district court to consider an offender’s reasonable ability to pay discretionary restitution. See, e.g., *State v. Hansen*, S.Ct. No. 17-1945, 2019 WL 5067124 (Iowa Ct. App. Oct. 9, 2019); *State v. Harris*, S.Ct. No. 18-0593, 2019 WL 5067137 (Iowa Ct. App. Oct. 9, 2019); *State v. Cassias*, S.Ct. No. 18-1174, 2019 WL 4678164 (Iowa Ct. App. Sept. 25, 2019). Given this, the State has asked for retention in three other cases: *State v. Staake*, S.Ct. No. 19-0451, *State v. Lyon*, S.Ct. No. 19-0363, and *State v. Witham*, S.Ct. No. 18-1548. The State asks the Court to retain this case as well. Iowa R. App. P. 6.1101(2)(d), (f).

STATEMENT OF THE CASE

Nature of the Case

Daniel Davis was convicted of second-degree theft and possession of a controlled substance as a third offense. See Iowa Code §§ 124.401(5), 714.4, 714.2(2). He appeals that portion of the judgment imposing costs as restitution.

The Honorable Mary E. Chicchelly presided.

Course of Proceedings

The State accepts the defendant's course of proceedings. Iowa R. App. P. 6.903(3).

Facts

Daniel Davis possessed a stolen 2015 Dodge Ram 2500 diesel pick-up truck and methamphetamine. Mins. Test. p. 1-2; Conf. App. 4-5; Plea Tr. p. 17, l. 23-p. 21, l. 13. And he had two prior felony drug convictions. *Id.*; Conf. App. 4-5.

When Davis entered an *Alford* plea,¹ the State outlined the agreement and stated,

I'd recommend the minimum fine and restitution. I have no objection to the Court suspending that fine in lieu of the restitution owed, the Defendant's costs and attorney fees.

¹ *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970).

Plea Tr. p. 2, l. 17-p. 4, l. 17. Defense counsel said this comported with his understanding. *Id.* p. 3, l. 18-p. 4, l. 2.

Davis believed he would be convicted if he went to trial, the sentence for which would threaten his health. *Id.* p. 19, ll. 7-10. Davis wished to be sentenced immediately. *Id.* p. 22, l. 25-p. 24, l. 6. The Court secured Davis' agreement that he "may also have to make victim restitution, restitution for court costs and restitution for court-appointed attorney fees. ..." *Id.* p. 13, ll. 24-p. 14, l. 4.

The Court imposed a law enforcement initiative and DARE surcharge. Order Accepting Plea & Judgment; App. 16-17. It ordered Davis to pay victim restitution pursuant to a statement of pecuniary damages to be filed by the State. *Id.*; App. 16-17. And it ordered Davis to pay the costs of the action as well as his legal assistance. *Id.*; App. 17.

On August 28, 2018, a "Restitution Plan" was filed listing \$405.50 in costs. Rest. Plan (filed Aug. 28, 2018); App. 19. On August 31, 2018, the State filed a statement of the victim's pecuniary damages in the amount of \$2,000. Statement of Pec. Damages (filed Aug. 31, 2018); App. 20. That day, the Court "granted" the statement, ordered Davis to file an objection within 10 days, and stated,

“[r]estitution is to be paid to the victim ... in the total amount of \$2,000.” Order for Statement of Pec. Dam. (filed Aug. 31, 2018); App. 23. A September 14, 2018 combined docket report lists a \$100 filing and docketing fee, a \$40 court reporter fee, and \$265.50 in Sheriff’s fees. Combined Docket, p. 8; App. 26. Together, this totals \$405.50. Later, on September 19, 2018, a second “Restitution Plan” was filed listing the \$2,000 victim restitution and \$405.50 in “Costs.” Rest. Plan (filed Sept. 19, 2018); App. 27. The “Restitution Plan,” signed not by the court but by a Department of Corrections official, states that the Davis “has been ordered to pay the County Clerk of Court 20 percent of all credits” to his account. *Id.*; App. 27. It further states any attempt to violate the conditions of the plan will result in major disciplinary proceedings. *Id.*; App. 27.

There is no court order providing a final order of restitution or adopting this Department of Corrections statement as the final order.

ARGUMENT

I. The district court has not issued a final order of restitution. Orders in advance of it are not enforceable or appealable.

Standard of Review

The Court reviews restitution orders for correction of errors at law. *State v. Albright*, 925 N.W.2d 144, 158 (Iowa 2019); *State v. Klawonn*, 688 N.W.2d 271, 274 (Iowa 2004).

Preservation of Error and Merits

Davis complains the district court ordered him to pay an unknown amount of court costs and attorney fees without assessing his reasonable ability to pay. Appellant's Pr. Br. pp. 21-22. But the district court has not yet issued a final restitution order. As such, it is not required to determine Davis' reasonable ability to pay. And, given the lack of a final order, the district court's order pertaining to costs and attorney fees is not appealable or enforceable.

With some exceptions, defendants may challenge illegal sentences for the first time on appeal. *Compare Tindell v. State*, 629 N.W.2d 357, 359-60 (Iowa 2001) (noting distinction between illegal sentences challenged under Iowa Rule of Criminal Procedure 2.24(5) and procedurally defective sentences) *with State v. Headley*, 926 N.W.2d 545, 552 (Iowa 2019) (citing *State v. Gordon*,

921 N.W.2d 19, 23-24 (Iowa 2018) and requiring defendant to preserve challenge to presentence investigation report). Restitution challenges do not fall neatly into the “illegal sentence” rule for error preservation.

Iowa Code chapter 910 governs restitution. Iowa Code ch. 910 (2019). A defendant must repay a victim’s losses irrespective of his ability to pay it. Iowa Code § 910.2(1). Other losses include court costs and attorney fees; repayment of these are subject to a defendant’s reasonable ability to pay. *Id.* §§ 910.1(4), 910.2(1), 910.3. When the amounts of restitution are not available, the court may issue temporary, supplemental, and permanent orders. *Id.* § 910.3; *Albright*, 925 N.W.2d at 160. A plan of restitution is not complete until the district court has all figures available and issues “the final restitution order.” *Albright*, 925 N.W.2d at 160 (citing *State v. Jackson*, 601 N.W.2d 354, 357 (Iowa 1999)). Only after the court issues a final order of restitution, the Department of Corrections can prepare a “plan of payment.” Iowa Code § 910.5(1)(d); Iowa Admin. Code r. 201-20.11.

In the interim, an appellate court will not review a failure to assess a defendant’s reasonable ability to pay unless the district court

has ordered a plan of restitution. *State v. Swartz*, 601 N.W.2d 348, 354 (Iowa 1999); *Jackson*, 601 N.W.2d at 357. *Albright* held “[r]estitution orders entered by the court prior to the final order are not appealable as final orders or enforceable against the offender.” *Albright*, 925 N.W.2d at 161.

Thus, first and foremost, Davis’ claim is not ripe. There is, as yet, no complete accounting of Davis’ court costs. Until such time as these costs are assessed and imposed in a final order of restitution, a court is not required to determine the offender’s reasonable ability to pay. *See State v. Haas*, 930 N.W.2d 699, 704 (Iowa 2019) (citing *Albright*, 925 N.W.2d at 161).

Second, Davis has not exhausted his administrative remedies. Once the district court orders a plan of restitution, Davis can petition the district court for a modification under Iowa Code section 910.7. *Swartz*, 601 N.W.2d at 354; *Jackson*, 601 N.W.2d at 357. “Until that remedy has been exhausted, [this Court] ha[s] no basis for reviewing the issue.” *Swartz*, 601 N.W.2d at 354; *Jackson*, 601 N.W.2d at 357.

Finally, it is not clear that Davis has suffered harm from the order he disputes. It is true the Clerk has assessed restitution amounts. Combined Docket; App. 26. It is true that a Department of

Corrections worker has tabulated \$405.50 in costs and a filing states cautionary language. Rest. Plan (filed Sept. 19, 2018); App. 27. But these are not court orders. Even if they were, restitution orders “entered by the court prior to the final order are not...enforceable against the offender.” *Albright*, 925 N.W.2d at 161. In the absence of a final restitution order, these filings are unenforceable. Defendant cannot suffer harm from the sentencing order. His challenge, at least as it relates to the sentencing order, is not appealable.

If a restitution order states a specific amount is “due immediately” without determining a reasonable ability to pay, that does not comply with *Albright* or the procedure for restitution. Iowa Code § 910.2; *State v. Petty*, S.Ct. No. 18-0437, 2019 WL 13002674, at *5 (Iowa Mar. 22, 2019). Orders that state a restitution amount are not themselves enforceable under *Albright*. Clerks offices and the Department of Corrections should not be enforcing such orders. Until there is an enforceable final order of restitution, direct appeal is not the defendant’s avenue for redress.

Albright, of course, did reverse, seemingly in the absence of a final plan of restitution. The Supreme Court has reversed some sentencing orders under *Albright*. See, e.g., *Headley*, 926 N.W.2d at

552; *Gordon*, 921 N.W.2d at 23-24. The Court of Appeals has taken this to mean that notwithstanding the absence of a final order of restitution—and notwithstanding *Albright*'s language—it must reverse non-final restitution orders. *See, e.g., State v. Hansen*, S.Ct. No. 17-1945, 2019 WL 5067124 (Iowa Ct. App. Oct. 9, 2019); *State v. Harris*, S.Ct. No. 18-0593, 2019 WL 5067137 (Iowa Ct. App. Oct. 9, 2019); *State v. Cassias*, S.Ct. No. 18-1174, 2019 WL 4678164 (Iowa Ct. App. Sept. 25, 2019); *see also State v. Moore*, S.Ct. No. 18-1877, 2019 WL 4297255, at *5, n.3 (Iowa Ct. App. Sept. 11, 2019) (collecting cases); *State v. Gavin*, S.Ct. No. 18-1258, 2019 WL 2871423, at *1–2, fn. 4 (Iowa Ct. App. July 3, 2019). Recently, the Court of Appeals wrote, “both of Iowa’s appellate courts have often vacated restitution-related orders absent a final restitution order.” *State v. Comly*, S.Ct. No. 18-1825, slip op. 3 (Iowa Ct. App. October 9, 2019).

Albright should be clarified. Perhaps by using the phrase “not appealable” as a final order, the Court was explaining that direct appeal is not the appropriate vehicle for review. *See* Iowa Code § 814.6 (listing matters subject to direct appeal and discretionary review). Perhaps the Court had in mind that the offender must

exhaust his remedies under section 910.7 where orders are less than clear. *See Jackson*, 601 N.W.2d at 357. Perhaps the Court anticipates that district courts and clerks will employ different captions and language in orders consistent with *Albright*. Perhaps the Court believes the Department of Corrections will apply or amend its rules for restitution. *See Iowa Admin. Code r. 201-20.11*.

The bench and bar could benefit from clarification. While the State can understand the Court of Appeals' perspective, without a fuller explanation, *Albright* appears internally inconsistent. Iowa Code sections 814.6, 910.3 and .7 as well as the Administrative Code offer better guidance. If a court or the Department of Corrections issues an illegal order, an offender may file a petition for certiorari or grievance under chapter 17A as the case may be.

There is reason for caution here. According to the plea agreement, the State recommended suspending the fine in lieu of Davis paying "costs and attorney fees." Plea Tr. p. 2, l. 17-p. 4, l. 10. Now that the court has suspended the fine, Davis seeks a further concession: repayment of costs and attorney fees only according to his reasonable ability to pay. This hazards an effort to make a favorable plea bargain in the district court a better one on appeal.

See State v. Ceretti, 871 N.W.2d 88, 97-98 (Iowa 2015) (concerning illegal sentence challenge); *State v. Walker*, 610 N.W.2d 524, 526 (Iowa 2000) (concerning merger of convictions).

The Court should dismiss Davis' appeal. If the Clerk or the Department of Corrections are collecting fees from Davis without an enforceable order, he may challenge those actions in administrative proceedings or under chapter 910.

Alternatively, if the Court of Appeals is correct in its reading of *Albright*, the Court should remand this matter to the district court. The district court need not conduct a reasonable ability to pay determination until it issues a final order of restitution. Or, it may conclude Davis has such an ability to pay based on current financial data. But that determination is not appealable until the final order of restitution.

CONCLUSION

The Court should dismiss the appeal. If the Court does not, it may remand for an order clarifying that sums are not due until a final plan of restitution issues.

REQUEST FOR NONORAL SUBMISSION

The State agrees with Davis that this matter does not require oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(f)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,186** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(f)(1).

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